

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
SOL AND ROSLYN (DECEASED) AND LINN S. C. SIEGEL	:
	DETERMINATION
	DTA NO. 810575
for Redetermination of Deficiencies or for	:
Refund of New York State and New York City	:
Income Taxes under Article 22 of the Tax Law	:
and the New York City Administrative Code for	:
the Years 1986 through 1988.	:

Petitioners, Sol and Roslyn (deceased) and Linn S. C. Siegel, 6351 Evian Place, Boynton Beach, Florida 33437, filed a petition for redetermination of deficiencies or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1986 through 1988.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 8, 1993 at 9:15 A.M., with all briefs to be submitted by March 10, 1994. Petitioners appeared by Horowitz, Goldman & Ettelman, Esqs. (Steven A. Horowitz, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (David C. Gannon, Esq., of counsel).

ISSUES

I. Whether petitioners were domiciliaries of the State and City of New York for the years at issue and were, therefore, taxable as resident individuals for such years.

II. Whether, for the years at issue, petitioners maintained a permanent place of abode and spent, in the aggregate, more than 183 days in the State and City of New York and were, therefore, taxable as resident individuals for such years.

FINDINGS OF FACT

On August 13, 1990, the Division of Taxation ("Division") issued a Notice of Deficiency to petitioners Sol and Roslyn Siegel asserting a total additional amount due of

\$27,709.32 for the years 1986 and 1987. This total amount represented the following:

	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
1986 State	\$ 5,683.44	\$1,640.88	\$1,672.95	
City	2,564.93	740.53	754.99	
1987 State	6,751.87	1,430.29	1,727.92	
City	<u>3,230.46</u>	<u>684.33</u>	<u>826.73</u>	
Total	\$18,230.70	\$4,496.03	\$4,982.59	\$27,709.32

Previously, on January 17, 1990, these petitioners, by their representative (pursuant to a power of attorney), executed a consent whereby it was agreed that personal income taxes due for the year 1986 could be assessed at any time on or before April 15, 1991.

For each of the years 1986 and 1987, Sol and Roslyn Siegel filed a Form IT-203, nonresident return under the filing status "married filing joint return."

Roslyn Siegel died on February 15, 1987 and petitioner Sol Siegel married Michelle Linn Shiu Chou Sullivan (a/k/a Linn S. C. Siegel) in June 1987.

On August 13, 1990, the Division issued a Notice of Deficiency to Sol and Linn S. C. Siegel asserting a total amount due of \$18,568.46 for the year 1988. This amount consisted of the following:

	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
State	\$9,352.00	\$1,176.61	\$1,991.10	\$12,519.71
City	4,518.31	568.47	961.97	<u>6,048.75</u>
			Total	\$18,568.46

For the year 1988, Sol and Linn S. C. Siegel filed a Form IT-203 under the filing status "married filing joint return."

On May 24, 1990, the Division issued statements of personal income tax audit changes for each of the years at issue. On the first page of each statement, under the heading "remarks", it was indicated that the taxpayer never severed ties to New York for the last 25 years, spends more than 30 days in New York, owns a co-op at 47-30 61st Street, Woodside, New York and is an active shareholder in Liberty Bell Christmas, Inc. ("Liberty Bell").

Attached to the 1986 return was a Wage and Tax Statement (Form W-2) indicating

wages paid to Sol Siegel in the amount of \$88,700.00 from Liberty Bell.¹ Mr. Siegel allocated \$10,705.00 of this income to New York on the basis that 28 days were worked in the State.

For 1987, Sol Siegel allocated \$19,515.00 out of total wages of \$88,775.00 received from Liberty Bell to New York on the basis that 51 days were worked in New York.

Attached to the 1988 return (filed jointly with Linn S. C. Siegel) were wage and tax statements from Liberty Bell (\$92,300.00) and Serv-Well Charcoal Co., Inc. (\$38,000.00). Mr. Siegel allocated \$24,289.00 (55 days

worked in New York out of a total of 209 days) of his Liberty Bell salary to New York. None of the salary from Serv-Well Charcoal Co., Inc. ("Serv-Well") was allocated to New York.

The address of Liberty Bell, set forth on the wage and tax statements for all of the years, was 1150 Motor Parkway, Central Islip, New York and Mr. Siegel's address was listed as 7460 NW 7th Place, Margate, Florida. The address of Serv-Well, on the wage and tax statement for 1988, was 445 Winding Road, Old Bethpage, New York and the statement was issued to Mr. Siegel at 47-30 61st Street, Woodside, New York.

Petitioner Sol Siegel was employed by Liberty Bell for approximately 47 years. Liberty Bell is in the business of importing Christmas decorations and artificial trim-a-trees. Mr. Siegel developed the importing business approximately 15 years after beginning his employment with Liberty Bell and eventually became a part-owner of the business (the Division's auditor stated that he owned a 29% interest).

Sol Siegel was also employed during the years at issue by Serv-Well of Old Bethpage, New York. His function was to accompany the purchase manager on overseas buying trips and

¹On both the 1986 and 1987 returns, the amounts set forth on line 1 (wages, salaries, tips, etc.) are greater than the amounts listed on the W-2 form. The record indicates that Roslyn Siegel was not employed, but there is no explanation as to this discrepancy. However, since no issue has been raised with respect to allocation and since, by virtue of the Division's holding that petitioners were residents of the State, all income was held to be taxable, this discrepancy will not be further addressed herein.

to deal with overseas suppliers (see, Exhibit "I"). The record is unclear as to the years of his employment. Only for the year 1988 was a Wage and Tax Statement from Serv-Well attached to Sol Siegel's return.

In approximately 1961 or 1962, Sol and Roslyn Siegel purchased a cooperative apartment ("the co-op") from Big Six Towers, Inc. located at 47-30 61st Street, Woodside, New York. The co-op, consisting of three bedrooms, was sold by Sol Siegel in 1990.

In the early 1970's, Sol and Roslyn Siegel purchased a home (two bedrooms, family room and swimming pool) located at 7460 NW 7th Place, Margate, Florida 33063. They registered to vote in Broward County in the State of Florida on April 24, 1972.

Between 1980 and 1982, Sol and Roslyn Siegel purchased a one-room condominium on the ocean located in Long Beach, New York. In August 1988, Sol Siegel sold the Long Beach condo to his daughter, Joan Siegel, who testified that the purpose of the sale was to effectuate estate planning, i.e., to remove the asset from Sol Siegel's estate. On an annual basis, this transaction is shown as interest income to Sol Siegel and as an interest expense to Joan Siegel. Sol Siegel annually forgives a part of Joan Siegel's obligation on an installment note executed in connection with this transaction (see, Exhibit "J").

For each of the years at issue (Sol and Roslyn Siegel in 1986, Sol Siegel in 1987 and Sol and Linn S.C. Siegel in 1988), petitioners filed affidavits with Big Six Towers, Inc. which set forth household income. These affidavits (Exhibit "H") indicate that there was a maximum allowable income per apartment which, if exceeded, resulted in a monthly rental surcharge being imposed.

On the affidavit for 1986, gross income of \$28,000.00 was reported. For 1987 and 1988, gross income of \$27,300.00 and \$38,400.00, respectively, was reported thereon. These amounts do not correspond to either the Federal or New York State amounts on petitioners' New York State tax returns (Exhibits "E", "F" and "G") and each of the amounts is less than the maximum allowable pursuant to the information contained thereon.

Each of the affidavits was sworn to before a Notary Public and, in the upper right portion

thereof, contained a directive to list, for each working member of the household, the income reported on Form IT-201 or IT-200 which, it should be noted, are resident returns. As indicated in Findings of Fact "2" and "3", petitioners filed nonresident returns (Form IT-203) for each of the years at issue.

Petitioners' brief states that they purchased a home in Florida in 1976 (Exhibit "4" indicates that they registered to vote in Florida in 1972). The brief further states that Mr. Siegel continued to file New York resident income tax returns until 1982 despite the fact that petitioners intended to make Florida their permanent place of residence in 1976. No explanation for this inconsistency was provided by petitioners.

The sole witness who appeared at the hearing to testify on behalf of petitioners was Joan Siegel, the daughter of Sol and Roslyn Siegel. Neither Sol nor Linn S. C. Siegel testified; Roslyn Siegel died on February 15, 1987. Sol Siegel had a heart attack and also had triple bypass surgery performed in 1989.

Joan Siegel stated that she was raised in the Woodside co-op; she moved out in approximately 1970 but continued to reside in New York. The co-op was referred to as the "closet" because that was where all the winter clothing was stored. From the time at which the Florida house was purchased (in the early 1970's), Roslyn Siegel spent all but July and August for each year in Florida and spent July and August in the Long Beach condo. Ms. Siegel testified that her mother never went to the Woodside co-op. She stated that the co-op was retained because of its low cost.

Joan Siegel stated that her father's whole life was his work. He was frequently traveling through the Orient doing business. When in New York, he used the Woodside co-op rather than a hotel. Joan Siegel testified that Liberty Bell paid her father's travel expenses.

On December 20, 1985, Roslyn Siegel suffered a stroke which left her paralyzed and speechless. After the stroke, Roslyn Siegel was in the hospital for approximately ten days and then went into a rehabilitation facility. Joan Siegel immediately went to Florida upon learning of her mother's stroke. Despite the fact that her brother (Roslyn Siegel's son) lived in Florida

and that her father (Sol Siegel) was also there, Joan decided to take her mother back to New York because her father was going to the Orient on a business trip. Therefore, at the end of January 1986, she brought Roslyn Siegel to New York to continue rehabilitation at the Rusk Institute where she remained until the end of March 1986 (when Sol Siegel returned from the Orient) whereupon she returned to Florida. Other than the Rusk Institute in New York, all of Roslyn's medical treatment and rehabilitation occurred in Florida (see, Exhibits "5" and "6"). Roslyn Siegel died in Broward County, Florida on February 15, 1987. Her funeral was in Tamarac, Florida and she was buried in a family cemetery plot in Elmhurst, New York.

Joan Siegel testified that her mother wanted her father to retire for many years. She stated that, while he cut down on his workload, he continued to make his trips to the Orient. He spent three or four weeks per year at the Long Beach condo, but spent most of the remaining time in Florida and the Orient.

A letter from Joel Margolin, Liberty Bell's president (see, Exhibit "1"), dated November 7, 1990 states as follows:

"Sol Siegel relinquished day-to-day managerial activities of this company at least ten years ago.

"Mr. Siegel's sole duties of employment since then with Liberty Bell Christmas, Inc. is to deal with overseas suppliers with whom he has long standing ties which requires him to be overseas at their location for several months during the years and to select merchandise to be purchased by Liberty Bell Christmas, Inc. for sale to our customers.

"His New York-related activities are therefore minimal and limited to attendance at a seasonal trade show which usually involves two or three weeks in February."

Sol Siegel's work area log (Exhibit "N") indicates a presence in New York on an almost monthly basis for each of the years at issue. As indicated in Finding of Fact "5", Sol Siegel's income from Liberty Bell was approximately the same for 1986 and 1987 and his income increased slightly in 1988.

During the years at issue, the Queens telephone directory contained a listing for Sol Siegel and for Roslyn Siegel, each at 47-30 61st Street in Woodside (area code 718). There was also a joint listing (Sol and Roslyn Siegel) at 830 Shore Road, Long Beach (area code 516).

Joan Siegel attempted to obtain New York Telephone statements as well as Long Island Lighting Company ("LILCO") statements for petitioners' Woodside and Long Beach residences for the years at issue, but was unable to do so (see, Exhibit "2").

The Division submitted invoices and summaries of petitioners' Southern Bell charges for 1987 and 1988 (see, Exhibit "K"). With the exception of January-February 1987, February-March 1987, March-April 1988 and November- December 1988, the monthly charges ranged from approximately \$18.00 to \$26.00 (most were in the \$18.00 to \$22.00 range).

The Division also submitted a letter (see, Exhibit "L") from FPL (Florida Power and Light). This letter was addressed to Sol Siegel and/or Michelle Siegel, 6351 Evian Place, Boynton Beach, Florida 33437, an address which is different from the Margate, Florida home purchased in the early 1970's (see, Finding of Fact "7"). Since it cannot be ascertained to which address this FPL letter applied, it will not be considered herein.

Approximately four months after Roslyn Siegel's death in February 1987, Sol Siegel married Linn S. C. Sullivan (Michelle). A civil marriage ceremony was performed in New York in June 1987 and another "big" wedding was held in Taiwan. Linn was a New York State resident (she continued to reside in New York throughout 1987) and filed resident income tax returns until 1987 (see, Petitioner's brief, p. 6). Her son, Michael, lived with his grandmother in Taiwan and later with his aunt in Chicago. After Linn's marriage to Sol Siegel, they tried to enroll Michael in a school in New York where he was to be under the care of one of his mother's friends, but he ran away and returned to Chicago. Thereafter, Michael moved to Florida and enrolled in Coconut Creek High in Broward County, Florida for the 1988-1989 school year (see, Exhibit "3"). While residing in Florida, Linn S. C. Siegel was not employed.

While residing in Florida, Roslyn Siegel was not employed. Joan Siegel testified that Roslyn was a "social butterfly" whose friends, after her death, did not accept Sol Siegel's new wife. Therefore, Sol and Linn S. C. Siegel did not go back to the Long Beach condo and it was ultimately sold to Joan Siegel (see, Finding of Fact "7").

During the years at issue, Sol and Roslyn Siegel maintained bank accounts in both New

York and Florida. They did not belong to any religious organizations or houses of worship in either state. They had no safe deposit box; the Florida home had a built-in vault. They belonged to no social or charitable organizations or country clubs in New York or Florida.

Exhibit "N" consists of typewritten work area logs as well as a document entitled "Sol Siegel Chronology" for the period March 5, 1985 through May 20, 1991. A review of these documents reveals many inconsistencies. For example, the work area log for 1986 indicates that Sol Siegel was in Florida, New Jersey, Connecticut and New York from May 1 through May 30. The chronology shows entry into the Republic of China on May 10, 1986 and further indicates that Sol Siegel spent the remainder of May 1986 traveling between the Republic of China and Hong Kong. There are several additional inconsistencies as well. It must also be noted that, except for 1987, the days worked in New York for 1986 and 1988 per the work area logs (53 and 46, respectively) do not correspond to the number of New York days set forth on the 1986 and 1988 returns (see, Finding of Fact "5"). This exhibit also contains photocopies of Sol Siegel's passports and visas but, absent explanatory testimony therefor, are of little value in determining Mr. Siegel's actual whereabouts during the periods at issue herein.

At the hearing, petitioners' representative requested additional time to submit travel vouchers and/or airline tickets used by Sol Siegel. The covering letter attached to petitioners' brief, dated November 12, 1993, indicated that a diligent search of Mr. Siegel's records and his employer's records produced no credit or travel records from 1986 to 1990. Therefore, petitioners' representative requested additional time to obtain and submit travel documentation from the credit card company of Mr. Siegel's former employer and indicated that this information would be available in approximately four weeks.

By a letter dated November 19, 1993, the Division objected thereto on the basis that the deadline for submitting this additional evidence was the date on which the brief was due (November 15, 1993).

By a letter dated November 19, 1993, the Administrative Law Judge overruled the Division's objection and set forth a revised briefing schedule.

Along with a letter dated December 17, 1993, petitioners' representative submitted the following:

- "1. Liberty Bell Christmas, Inc's. American Express Corporate Account records concerning Sol Siegel.
- "2. Liberty Bell Christmas Inc's. expense reports for Sol Siegel.
- "3. A chart prepared by this office delineating Sol Siegel's Travel Itinerary for the years 1986-1988. This chart summarizes the charge records and expense reports enclosed herewith.
- "4. Affidavit of Bernard Sanford, who was the accountant and controller of Liberty Bell Christmas Inc. during the years involved herein.
- "5. Affidavit of Petitioners' counsel."

In a letter dated December 21, 1993, the Division's representative objected to the introduction into evidence of all but item "1" above, since additional time had not been requested to submit items "2" through "5".

The letter of the Administrative Law Judge, dated December 23, 1993, in response to the Division's objection, stated, in part, as follows:

"You do not object to the American Express records from Mr. Siegel's employer since the record was specifically kept open for the production of these documents. With respect to the remaining documents, I must agree that they cannot now be accepted into evidence. The time for this evidence to have been offered was at the hearing unless petitioner specifically requested (and was granted) additional time therefor. I do find, however, that the affidavit of petitioner's representative, Steven A. Horowitz, Esq., serves to explain that a diligent search was made and that the records are incomplete and, as such, is relevant to this record. Such affidavit will, therefore, be accepted into evidence along with the American Express records and shall be designated as petitioner's Exhibit No. 7.

"By a copy of this letter, I am advising petitioner's representative that the remaining documents are being returned to him and, accordingly, such documents are enclosed with his copy of the letter."

In a letter, dated December 31, 1993, to Roberta Moseley Nero, Secretary to the Tax Appeals Tribunal, petitioners' representative objected to the Administrative Law Judge's refusal to accept petitioners' additional offerings of evidentiary material, requesting that "Judge Friedman reconsider his decision not to allow said Expense Reports into evidence."

Ms. Moseley Nero's reply letter of January 18, 1994 stated that the letter of December 31, 1994 would be forwarded to Administrative Law Judge Friedman and that the Tax Appeals

Tribunal has no involvement in a case prior to an exception being filed.

An examination of these credit card receipts indicates that many were for expenses incurred by Joel Margolin (president of Liberty Bell) as well as by Sol Siegel. Most do not indicate the actual date on which the charge was incurred. Many are illegible.

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1) provides, in pertinent part, as follows:

"Resident individual. A resident individual means an individual:

"(A) who is domiciled in this state, unless

"(i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or

"(ii)(I) within any period of five hundred forty-eight consecutive days he is present in a foreign country or countries for at least four hundred fifty days, and (II) during such period of five hundred forty-eight consecutive days he is not present in this state for more than ninety days and does not maintain a permanent place of abode in this state at which his spouse (unless such spouse is legally separated) or minor children are present for more than ninety days, and (III) during any period of less than twelve months, which would be treated as a separate taxable period pursuant to section six hundred fifty-four, and which period is contained within such period of five hundred forty-eight consecutive days, he is present in this state for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in such period of less than twelve months bears to five hundred forty-eight, or

"(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

B. While there is no definition of "domicile" in the Tax Law, the Division's regulations (20 NYCRR former 102.2[d]) provide, in pertinent part:

"Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent. (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he

did this merely to escape taxation in some other place.

* * *

"(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

Permanent place of abode is defined in the regulations at 20 NYCRR former 102.2(e)(1)

as:

"a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

C. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 App Div 444, 445, 126 NYS 970). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276).

In Matter of Newcomb (192 NY 238, 250-251), the Court of Appeals stated:

"Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

"The existing domicile, whether of origin or selection, continues until a new one is acquired, and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence although continued for a long time, does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile There must be a present, definite, and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim, or fancy, for business, health, or pleasure, to

secure a change of climate, or change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the person affected confirm the intention No pretense or deception can be practiced, for the intention must be honest, the action genuine, and the evidence to establish both clear and convincing. The animus manendi must be actual with no animus revertendi. . . .

"This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice."

D. As previously stated, the burden of proof rests upon the parties who allege that a change of domicile occurred. Since Roslyn Siegel is deceased and since neither Sol Siegel nor Linn S. C. Siegel appeared at the hearing to testify, it is necessary to examine the acts of these petitioners in order to ascertain their intent.

That Sol and Roslyn Siegel purchased a house in Florida in the 1970's is not in dispute. However, moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (see, Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990).

It is apparent that Sol and Roslyn Siegel did not contend that the change of domicile took place upon the purchase of the Florida house because they continued to file as New York residents until 1982. If 1982 is the point at which the intent to abandon their previous domicile (New York) and to acquire a new one (Florida) occurred, this record contains no evidence to substantiate this intent. Sol and Roslyn Siegel, during each of the years at issue, filed an affidavit with the Big Six Towers, Inc. (see, Finding of Fact "8") which, in addition to substantially understating their income, stated, by implication (due to the directive to enter their income from a particular line on a resident return), that they were residents of New York in order, presumably, to avoid monthly rental surcharges.

Despite the contentions of petitioners' representative, it cannot be found that Sol Siegel reduced his active participation in Liberty Bell's affairs. While it is conceivable that his salary was greater in years prior to the audit period, there has been no evidence introduced relative thereto. Sol Siegel's salary from Liberty Bell was substantial during the years at issue (see,

Finding of Fact "5") and actually increased for 1988, the last year of the audit period. In addition to his Liberty Bell salary, he also earned \$38,000.00 from work performed for Serv-Well Charcoal Co., Inc. It must be concluded, therefore, that Sol Siegel did not substantially reduce his active participation in these New York companies. While a taxpayer may change his or her domicile without "severing all ties with New York State" (see, e.g., Matter of Sutton, Tax Appeals Tribunal, October 11, 1990), this record is absent any evidence which would indicate that Sol Siegel's activities during the audit period differed from his activities in years prior thereto.

In Matter of Sutton (supra), that petitioner retained a rent-controlled apartment in New York City to provide inexpensive accommodations for him on visits to New York and also had "passive" business interests in three retail stores in New York. He derived his income from his businesses, but did not manage them day to day. The Tax Appeals Tribunal found Mr. Sutton to be domiciled in Florida, holding that the severance of his business ties to New York was so definite and pronounced that Florida was considered his true domicile. In Matter of Kartiganer (Tax Appeals Tribunal, October 17, 1991, confirmed 194 AD2d 879, 599 NYS2d 312), the petitioner was not found to have relinquished his active business interests in New York and, in fact, spent a considerable amount of his time in New York overseeing contracts and giving advice on past and future projects. He was an active consultant in constant contact with his office by telephone and courier service and was available to his firm on an as-needed basis. Mr. Kartiganer was found not to have relinquished his New York domicile.

In the present matter, like that of Matter of Kartiganer (supra), Sol Siegel has not proven, by clear and convincing evidence, that he ever relinquished his New York domicile during the years 1986 through 1988. While it appears from the testimony of Joan Siegel that her mother, Roslyn Siegel, may have relinquished her New York domicile, she was unemployed during the years at issue and all income for 1986 and 1987 was attributable to Sol Siegel. Since a joint return was filed for these years, the issue of Roslyn Siegel's domicile is of little relevance herein.

As to petitioner Linn S. C. Siegel, this record is absent any evidence regarding her intent to change her domicile. Petitioners' brief states that, after her marriage to Sol Siegel in June of 1987, she continued to reside in New York for the balance of 1987. While she apparently resided in Florida during her son's enrollment in a Florida school for the school year 1988-1989 (see, Finding of Fact "12"), there has been no introduction of any testimony or any documentary evidence to substantiate a change of domicile. Absent clear and convincing evidence of a change of domicile, petitioner Linn S. C. Siegel must also be found to have been a New York domiciliary for 1988. Again, however, since she was unemployed and filed a joint return with her husband, the issue of her domicile, like that of Roslyn Siegel, is academic.

E. 20 NYCRR former 102.2(e) defines "permanent place of abode" as:

"a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

Petitioners admit (see, page 6 of petitioners' brief) that the co-op in Woodside and the condo in Long Beach constitute permanent places of abode.

Even assuming, arguendo, that petitioners had proven a change of domicile, by virtue of having maintained a permanent place of abode in the State, they would have to prove that they did not spend more than 183 days, during any of the years at issue, in New York.

20 NYCRR former 102.2(c) provides, in part, as follows:

"Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State."

As previously indicated, absent any testimony, the documentary evidence submitted herein must carry petitioners' burden of proof with respect to this issue and, without question, such evidence has failed to do so.

The work area logs and chronology (both contained in Exhibit "N") contradict each other during various periods of the years at issue. In addition, the days claimed on the tax returns as having been worked in New York do not correspond to the numbers contained in either the logs

or the chronology. While the passport and visa documents (also contained in Exhibit "N") and the American Express records (Exhibit "7") indicate that petitioner Sol Siegel frequently traveled abroad, this evidence, in and of itself, does not constitute adequate proof that he did not spend more than 183 days in New York during 1986, 1987 or 1988. It must be found, therefore, that the Division properly held petitioners to be taxable as residents.

F. The petition of Sol and Roslyn (deceased) and Linn S. C. Siegel is denied and the notices of deficiency issued to petitioners on August 13, 1990 are sustained.

DATED: Troy, New York
September 1, 1994

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE